
YALE LAW & POLICY REVIEW

Recalibrating Campaign Finance Law

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INTRODUCTION

Campaign finance law is entering a new era, again.

The laissez faire approach of campaign finance regulators in the Gilded Age ushered in the anti-corruption and publicity acts of the Progressive Era. Eventually, the detailed regulatory apparatus of the post-Watergate reform era and the subsequent constitutional compromise under *Buckley v. Valeo*¹ displaced the original reforms. In turn, that regime gave way to the Bipartisan Campaign Reform Act of 2002 (BCRA)² and similar policy patchworks. Then came the response of *Citizens United v. Federal Election Commission*³ and related cases. In this new era, spending prohibitions are out of the question,⁴ contribution limits are suspect,⁵ and robust public funding now may be impracticable or unpopular.⁶ Yet broad disclosure requirements find a sound constitutional footing.⁷ As campaign finance regimes transition away from regulating which actors can spend money in elections, the central policy and legal questions going forward will ask how much an actor may spend without triggering contribution limits or disclosure requirements.

The typical campaign finance regime limits contributions and mandates disclosure by drawing lines above which contributions are prohibited or spending must be disclosed. Where a given regime draws those lines is variable, and each line has an optimal range in a particular jurisdiction at a particular time according to that jurisdiction's campaign practices.

Where these lines are drawn matters more than ever to the basic goals of campaign finance regulation. In a system of unlimited independent expenditures, and in the absence of other funding sources, contribution limits must be carefully calibrated within the broader campaign finance system to be effective. Limits that are too low may deprive a candidate of funds necessary to deliver a campaign message to voters. Limits that are too high may enable a candidate to discount all but the wealthiest donors, allow evasion of limits through a shell game of various donor entities, and threaten dependence on those donors to the point of corruption.

Similarly, disclosure thresholds may have an optimal range. Thresholds that are too low may chill contributions by average voters and leave the donor pool

1. 424 U.S. 1 (1976).

2. Pub. L. No. 107-155, 116 Stat. 81.

3. 558 U.S. 310 (2010).

4. See *id.* But see *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281 (D.D.C. 2011) (rejecting a challenge to a prohibition on campaign spending by foreign citizens).

5. See *Randall v. Sorrell*, 548 U.S. 230 (2006); *McCutcheon v. Fed. Election Comm'n*, 893 F. Supp. 2d 133, 137-38 (D.D.C. 2012), *prob. juris. noted*, 133 S. Ct. 1242 (2013).

6. See *Ariz. Free Enter. Club v. Bennett*, 131 S. Ct. 2806 (2011).

7. See *Doe v. Reed*, 132 S. Ct. 449 (2011); *Citizens United*, 558 U.S. at 366-71.

dominated by the most die-hard (and polarized) donors (who may welcome disclosure). A low threshold for disclosure also could push money away from candidates and party committees and toward interest groups whose expenditures are accompanied by little or no disclosure. Conversely, thresholds that are too high may conceal relevant information about a candidate's supporters or opponents, or allow evasion of disclosure through transfers among various corporate entities.

Contribution limits and disclosure thresholds interact with each other, and with the electoral, regulatory, and financial fundamentals of the relevant jurisdiction. A relatively low contribution limit may compromise participatory and anti-corruption goals. For example, if the accompanying disclosure threshold is too low, it may deter contributions from average voters or divert funding into interest groups with concentrated influence over narrower agendas. Similarly, a relatively low disclosure limit may not achieve its informational goals if, regardless of the potential chill on donors, an accompanying contribution limit is so low as to divert larger contributions into less transparent interest groups. Together, these and other campaign finance rules compose a system whose aggregate effects differ from, and may run contrary to, the individual effects of each rule.⁸ Importantly, due to interaction of rules within the system, any adjustment to one rule will necessarily have effects on the others. Any adjustment also necessarily will have effects on the larger campaign finance system in a given jurisdiction. As a result, campaign finance regulators—legislators, administrators, and judges—need to think about contribution limits and disclosure thresholds systematically. All told, it is the task of campaign finance regulators to identify the optimal range for each regulatory tool between “too much” and “too little,” and recalibrate accordingly to accomplish the various ends of campaign finance law.

What matters most in drawing lines for contribution limits and disclosure thresholds is the current relationship between these amounts and the campaign practices of a particular jurisdiction. This Essay seeks to provide a theoretical framework for conceptualizing this relationship and considering reforms. Part I traces the variation of campaign finance regimes across several political eras and several jurisdictional scales. Strikingly, although similar six-figure campaign finance scandals prompted the reforms of each era, federal lawmakers in each era have drawn progressively lower one-size-fits-all contribution limits and disclosure thresholds. Meanwhile, state campaign finance laws have been more carefully calibrated to reflect the electoral and financial circumstances of particular electoral contests. Part II considers the currently permissible means and ends of campaign finance law and how they constrain the calibration of contribution limits and disclosure thresholds. Part III explains how a recalibration of campaign finance laws in some jurisdictions might bring these regulations into alignment with the constitutional justifications for—and policy goals of—our system of campaign finance laws. Recalibration offers an important opportunity for both

8. See Anthony Johnstone, *The System of Campaign Finance Disclosure*, 98 IOWA L. REV. BULL. (forthcoming 2014).

opponents and proponents of regulation to ensure a better fit between the means and ends of campaign finance law.

I. THREE ERAS OF CALIBRATING CAMPAIGN FINANCE LAW

At both the state and federal levels, changes in campaign finance regimes track developments in political practice. Over the past century, scandals and broader anti-corruption concerns have tended to catalyze reforms in cycles. In each cycle, regulators attempt to realign law with practice. Scholars identify three major eras of campaign finance regulation: the Progressive Era, the post-Watergate era, and the current era.⁹

A. *The Progressive Era*

State legislatures began to regulate campaign finance around the turn of the twentieth century, and Congress soon followed.¹⁰ The concerns that precipitated these reforms arose from enormous corporate and individual contributions to political parties and campaigns. Some contributions ran into the hundreds of thousands of dollars, and a handful of large donors accounted for most of the presidential candidates' campaign chests of a few million dollars each.¹¹ The corrupt practices acts and related publicity acts at the federal and state levels generally mandated disclosure and limited campaign expenditures rather than limiting contributions. Although the laws often lacked effective enforcement provisions,¹² the disclosure thresholds and expenditure limits suggest how policymakers at the time calibrated campaign finance law to their anti-corruption and publicity concerns.

At the federal level, the Publicity of Political Contributions Act of 1910 and its 1911 amendments required name and address disclosure of donors of more than \$100 (about \$2300 in 2012 dollars).¹³ The Federal Corrupt Practices Act of

9. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 333 (4th ed. 2012) ("There have been three major political moments in the history of regulating the financing of federal elections.").

10. See Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOV'T L. REV. 1 (2008).

11. See Brad Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1054 (1996); see also *Newberry v. United States*, 256 U.S. 232, 245 (1921) (holding that Congress did not have the authority to regulate primary elections and remanding and reversing the conviction of Michigan Senate candidate Truman Newberry, who had spent \$100,000 in his primary on the way to winning his seat in 1918); Urofsky, *supra* note 10, at 12.

12. See Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. LEGIS. 421, 432 (2008); Urofsky, *supra* note 10, at 18.

13. Publicity of Political Contributions Act of 1910, ch. 392, § 6, 36 Stat. 822, 823.

1925 added disclosure of independent expenditures “aggregating \$50 [\$656 in 2012 dollars] or more within a calendar year for the purpose of influencing in two or more States the election of candidates.”¹⁴ Rather than contribution limits, the 1911 amendments set spending limits of \$10,000 in Senate campaigns (about \$232,000 in 2012 dollars) and \$5,000 in House campaigns (about \$116,000 in 2012 dollars). The same year, Congress also established its current size of 435 members.¹⁵ House campaigns therefore enjoyed significantly higher limits relative to their constituencies than statewide Senate campaigns. The 1925 Act later raised the Senate spending limit to \$25,000 (about \$328,000 in 2012 dollars). Although these laws limited spending rather than contributions, one proposal debated in the consideration of the 1925 Act contained similar spending limits but also limited contributions to \$500 for presidential campaigns (about \$6,600 in 2012 dollars) and \$100 for congressional campaigns (about \$1,300 in 2012 dollars).¹⁶

Unlike current federal law, which generally preempts state campaign finance laws,¹⁷ these early laws allowed state spending limits to control federal campaigns. States developed varied means of limiting expenditures. In 1923, New York limited gubernatorial candidates to spending \$10,000 (about \$134,000 in 2012 dollars).¹⁸ California and Montana both set spending limits based on ten percent of the salary for the office sought by the candidate.¹⁹ Many states calibrated campaign limits to a certain amount per voter. For example, in a 1912 law, Virginia limited spending on a nomination campaign to 15 cents per voter (\$3.37 in 2012 dollars).²⁰ Following the English Corrupt-Practices Act of 1883, several states, including Missouri, established a sliding scale of expenditure limits ranging from \$200 for the first 5,000 voters, \$4 for each one hundred voters up to 25,000, \$2 for each 100 voters up to 50,000, and \$1 for each 100 voters over 50,000.²¹ A dollar for 100 voters at the time, or a penny per voter, amounts to about a quarter per voter today.

These state laws may not have been any more effective than federal spending limits at the time, though they do suggest the extent of lawmakers’ corruption

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14. Federal Corrupt Practices Act of 1925, ch. 386, § 309(b)(2), 43 Stat. 1070, 1073.
 15. Apportionment Act of 1911, Pub. L. No. 62-65, § 1, 37 Stat. 13, 13 (codified at 2 U.S.C. § 2(a) (2006)).
 16. See S. 3114, 68th Cong., 65 CONG. REC. 6515 (1924).
 17. 2 U.S.C. § 453 (2006).
 18. N.Y. PENAL LAW § 781 (Consol. 1923).
 19. 1913 Cal. Stat. 396; 1913 Mont. Laws 596, 596. Montana allowed another 15 percent of salary to be spent in the nominating campaign. *Id.* at 593. In Montana, the Governor’s salary in 1913 was \$7,500. *Id.* at 23.
 20. VA. CODE ANN. ch. 306, 874, 877 (Pollard 1916).
 21. See EARL R. SYKES, STATE AND FEDERAL CORRUPT PRACTICES LEGISLATION 124 (1924) (citing English Corrupt-Practices Act of 1883, 46 & 47 Vict., c. 51 (Eng.) and MO. REV. STAT. § 43.6043 (1909)).

concerns in the context of then-prevailing campaign practices. Citing one comprehensive study of campaign spending, Louise Overacker reports that in the 1928 presidential campaign, “[t]he cost of Democratic votes ranged from \$4.46 in Nevada [about \$60 in 2012 dollars] to nothing at all in Maine and Vermont, while the Republicans spent \$1.75 per voter in Arizona [about \$24 in 2012 dollars] and 3 cents per voter in Maine [about \$0.40 in 2012 dollars].”²² These interstate variations reflect several factors, including the costs to campaign in sparsely settled states and the competitiveness of candidates in certain jurisdictions. The median amount spent in states by each presidential campaign was about \$0.50 per voter (about \$6.70 in 2012 dollars).²³

As at the federal level, most state corrupt practices acts regulated campaign expenditures rather than contributions. Louise Overacker’s review of state laws in 1932 suggests legislators were as concerned about improper influence of voters by candidates as improper influence of candidates by contributors.²⁴ At the time only two states, Massachusetts and Nebraska, limited individual contributions, both to \$1,000 (about \$17,000 in 2012 dollars). In Massachusetts this was an aggregate limit for contributions to all committees and candidates in an election cycle.²⁵

State campaign expenditure limits required close accounting of receipts and disbursements of political committees. The filing of these accounts with the Secretary of State or county clerk for inspection served disclosure purposes by publicizing both contributions and expenditures.²⁶ For example, Montana’s Corrupt Practices Act of 1912 required every political committee to account for payments of 5 dollars or more (about \$116 in 2012 dollars).²⁷ It further required every other person “not a candidate for any office or nomination who expends money or value to an amount greater than fifty dollars [about \$1,160 in 2012 dollars]” to file a statement of accounts with a public official and “the candidate or treasurer of the political organization whose success or defeat he has sought to promote . . .”²⁸ Around this time, NINE states established similar reporting requirements for individual campaign contributions or expenditures, ranging from 5 dollars in South Dakota to \$250 in Nebraska.²⁹

22. LOUISE OVERACKER, MONEY IN ELECTIONS 305 (1932).

23. *Id.* at 77.

24. *Id.* at 76.

25. *Id.* at 305.

26. *Id.* at 296-97.

27. 1913 Mont. Laws 593, 600.

28. *Id.*

29. OVERACKER, *supra* note 22, at 296-97.

B. The Post-Watergate Era

The Watergate scandal opened the modern era of campaign finance reform. As the reformers of the early twentieth century cited the hundred-thousand-dollar mega-donors of their time, reformers of the Watergate era also focused on contributions of hundreds of thousands of dollars. This time the big donations were made to the Committee to Reelect the President³⁰ in clear violation of the disclosure requirements of the recently passed Federal Election Campaign Act of 1971 (FECA).³¹ Meanwhile, the expense of the presidential campaign had increased by an order of magnitude to tens of millions of dollars. By the early 1970s, even the largest campaign contributor was one of a score of major supporters rather than one of a handful of patrons, as had been the case in the early 1900s.

The main innovations of the Federal Election Campaign Act Amendments of 1974 (FECA Amendments) were contribution limits and effective enforcement, paired with the stronger disclosure provisions of the 1971 Act.³² The contribution limit was fixed at \$1,000 (about \$4,660 in 2012 dollars) per individual to any single candidate in a single election (counting primary and general elections separately) and \$25,000 (\$116,000 in 2012 dollars) in total individual contributions for a year.³³ FECA and the FECA Amendments also imposed expenditure limits, though the Supreme Court invalidated them in *Buckley v. Valeo*.³⁴ The 1971 FECA maintained the original Publicity Act contribution-disclosure threshold of \$100 (\$567 in 2012 dollars), and required the donor's occupation and principal place of business as well as his name and address.³⁵ Beyond their reports of donors, political committees also had to maintain records of the name and address of every donor in excess of \$10 (\$47 in 2012 dollars).³⁶ Another \$100 (\$567 in 2012 dollars) disclosure threshold also applied to independent expenditures not made to a political committee or candidate.³⁷ In 1979, after criticism of FECA and amid double-digit inflation, further amendments raised the contribution disclosure threshold to \$200 (\$632 in 2012 dollars) and the independent expenditure threshold to \$250 (\$791 in 2012 dollars). These amendments also eliminated reporting requirements for candidates who spend or receive less than \$5,000 (\$15,812 in 2012 dollars).³⁸

30. See Urofsky, *supra* note 10, at 40-51.

31. 86 Stat. 3.

32. 88 Stat. 1263.

33. *Id.*

34. 424 U.S. 1, 39-60 (1976).

35. 2 U.S.C. § 434(b) (1976).

36. *Id.* § 432(c)(2).

37. *Id.* § 434(e).

38. Federal Election Campaign Act Amendments of 1979, Pub. L. 96-187, § 304, 93 Stat. 1339, 1353-54.

Meanwhile, states engaged in similarly broad campaign finance regulatory reforms. Unlike the federal reforms, which established a flat limit on contributions to every campaign from representative to president, most state contribution limits are calibrated to the candidate's office.³⁹ California voters approved the Political Reform Act of 1974, which established different aggregate spending limits for governor and other statewide campaigns applicable to candidates, parties, and independent expenditures.⁴⁰ The 1974 Act also required name, address, occupation, and principal place of business disclosure of individual contributions of \$50 (\$233 in 2012 dollars) or more.⁴¹ At a smaller scale, in 1975 the Montana legislature enacted new contribution limits and disclosure requirements along with more effective enforcement through a Commissioner of Political Practices.⁴² Montana also set per-election contribution limits at \$1500 (about \$6,400 in 2012 dollars) for governor and lieutenant governor, \$750 (\$3,200 in 2012 dollars) for other statewide candidates, and \$250 (\$1,067 in 2012 dollars) for legislature.⁴³ Committee reports disclosed the name, address, occupation, and principal place of business of donors of \$25 (\$107 in 2012 dollars) or more. All political committees were required to file reports regardless of the amount of their contributions or expenditures, except for local candidates that received or spent \$500 (\$2,134 in 2012 dollars) or less.

C. *The Current Era*

The *Buckley* compromise of unlimited expenditures and limited contributions led to another campaign finance recalibration in the Bipartisan Campaign Reform Act of 2002 (BCRA). However carefully calibrated the FECA disclosure requirements and the FECA Amendments contribution limits were, the hydraulics of campaign finance reform diverted large contributions into unlimited national political party "soft money" and undisclosed independent expenditure groups.⁴⁴ Both groups ostensibly did not have the purpose of supporting or opposing particular candidates, but each engaged in "issue advocacy" that in fact campaigned for or against targeted candidates by name during the election season.

The most notorious fundraising scheme giving rise to the current era of reforms involved a plan to offer overnight stays in the Lincoln Bedroom to donors

39. See *State Limits on Contributions to Candidates: 2011-2012 Election Cycle*, NAT'L CONF. STATE LEGISLATURES (June 1, 2012), http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2011-2012v2.pdf.

40. CAL GOV'T CODE § 85100-103 (West 1974).

41. *Id.* § 84210(g).

42. 1975 Mont. Laws 1250.

43. *Id.* 1265, 1265-66.

44. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1715-16 (1999).

who contributed \$100,000 or more to the Democratic Party.⁴⁵ Meanwhile, as the scale of campaign funding increased further, even the largest donors of soft money shared a circle of influence that now numbered in the hundreds rather than a handful.⁴⁶ Moreover, inflation meant that the benchmark \$100,000 contribution to the 2000 campaign would be valued at less than \$25,000 in 1972, and less than \$6,000 in 1912.

BCRA prohibited soft money contributions to national political parties.⁴⁷ It raised and indexed for inflation contribution limits, including an increase for individual contribution limits from \$1,000 to \$2,000 per election (raised to \$2,500 for the 2012 election cycle).⁴⁸ It also required additional reporting for independent expenditures of \$10,000 or more and for broadcast “electioneering communications” targeting named candidates before an election.⁴⁹ Moreover, BCRA contained two major provisions that have been invalidated. One extended the prohibition on corporate and union contributions and expenditures to electioneering communications, a restriction the Supreme Court invalidated as to all corporate independent expenditures in *Citizens United v. Federal Election Commission*.⁵⁰ Another provided for increasing the contribution limits for candidates running against substantially self-funded opponents. This so-called “Millionaire’s Amendment” was invalidated in *Davis v. Federal Election Commission*.⁵¹

Most states continue to impose contribution limits and require disclosure over certain thresholds.⁵² In the 2012 election cycle, the median gubernatorial contribution limit per election cycle was \$5,000 (the high was New York’s

45. See Alison Mitchell, *Clinton Pressed Plan to Reward Donors*, N.Y. TIMES, Feb. 26, 1997, <http://www.nytimes.com/1997/02/26/us/clinton-pressed-plan-to-reward-donors.html?pagewanted=all&src=pm>.

46. See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 124 (2003) (“For example, in 1996 the top five corporate soft-money donors gave, in total, more than \$9 million in nonfederal funds to the two national party committees. In the most recent election cycle the political parties raised almost \$300 million—60% of their total soft-money fundraising—from just 800 donors, each of which contributed a minimum of \$120,000.”).

47. See 2 U.S.C. § 441i (2006).

48. See *id.* § 441a(a), (c); 70 Fed. Reg. 8368 (Feb. 14, 2011) (2012 election cycle contribution limit).

49. See 2 U.S.C. § 434(f) (2006).

50. 558 U.S. 310 (2010).

51. 554 U.S. 724 (2008).

52. See *Contribution Limits: An Overview*, NAT’L CONF. STATE LEGISLATURES (Oct. 3, 2011), <http://www.ncsl.org/legislatures-elections/elections/campaign-contribution-limits-overview.aspx>. As of 2012, 39 states impose contribution limits, at least 14 of which index limits for inflation; 7 states limit contributions only by corporations or unions; and 4 states do not limit contributions. *Id.*

\$60,800 and the low was Arizona's \$872); the median state legislative contribution limit per election cycle was \$2,000 (the high was Ohio's \$23,087 and the low was Montana's \$320).⁵³ State disclosure thresholds are more uniform. The most common disclosure threshold for individual contributions is \$100.⁵⁴ Thresholds range from "zero-dollar" disclosure of the name and address of any campaign contributor in Florida, Michigan, and New Mexico regardless of contribution amount,⁵⁵ to a \$300 contribution disclosure threshold in New Jersey (Mississippi, North Dakota, and West Virginia have \$200 thresholds).⁵⁶ Most states also require disclosure by groups making independent expenditures at certain thresholds that qualify a group as a political committee, with levels of \$100 and \$500 being most common.⁵⁷ Independent expenditure triggers range from "zero-dollar" reporting in Montana to a \$3,000 threshold in Illinois.⁵⁸ Although there is no precise correlation of these various thresholds with the electorate size or campaign cost of each jurisdiction, each reflects local lawmakers' distinct calibration of their campaign finance regime.⁵⁹

II. MEANS AND ENDS

After *Citizens United*, the constitutional means and ends of campaign finance regulation are more limited. Contribution limits and mandatory disclosure are the primary permissible means of regulation, and anti-corruption and publicity are the primary permissible ends of regulation. For the moment, at least, lawmakers enjoy ample room to innovate and recalibrate contribution limits and

53. See *id.*

54. This number is based on a compilation of data available at *The Campaign Disclosure Law Database*, CAMPAIGN DISCLOSURE PROJECT (last visited Dec. 2, 2013), <http://disclosure.law.ucla.edu/default.aspx>. To access the information, select "Contributor Information: Is there a threshold amount for reporting individual contributions?" under the main site's search menu.

55. FLA. STAT. § 106.07(4)(a)(1) (2013); MICH. COMP. LAWS. § 169.226(1)(e) (2013); N.M. STAT. ANN. § 1-19-31 (A)(3) (2013).

56. N.J. STAT. ANN. § 19:44A-16(f) (2013); see MISS. CODE ANN. § 23-15-807(d)(ii) (2013); N.D. CENT. CODE § 16.1-08.1-02(2) (2013); W. VA. CODE § 3-8-5a(a)(3) (2013).

57. This number is based on a compilation of data available at *The Campaign Disclosure Law Database*, CAMPAIGN DISCLOSURE PROJECT (last visited Dec. 2, 2013), <http://disclosure.law.ucla.edu/default.aspx>. To access this information, select "Independent Expenditure: Does the state require disclosure of independent expenditures?" under the main site's search menu.

58. See 10 ILL. COMP. STAT. 5/9-10 (2012); MONT. ADMIN. R. 44.10.531(4) (2013).

59. See William P. Marshall, *The Constitutionality of Campaign Finance Regulation: Should Differences in a State's Political History and Culture Matter?*, 74 MONT. L. REV. 79, 81-87 (2013) (comparing significant differences among state politics relevant to campaign finance regulation, including population, demography, size of legislature, media costs, and political culture).

disclosure thresholds. Yet the margins of permissible regulation are unstable due to the doctrine controlling these areas. Contribution limits⁶⁰ and disclosure requirements⁶¹ are given “exacting scrutiny,” a misnomer for a variant of intermediate scrutiny in which “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”⁶² Assuming that this “exacting” standard of scrutiny holds,⁶³ *Citizens United* appears to further narrow the permissible justifications for both contribution limits and disclosure requirements.

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60. See *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (plurality opinion) (“[C]ontribution limitations are permissible as long as the Government demonstrates that the limits are ‘closely drawn’ to match a ‘sufficiently important interest.’” (citations omitted)); see also *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (“In view of the fundamental nature of the right to associate, governmental ‘action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.’ Yet, it is clear that ‘[n]either the right to associate nor the right to participate in political activities is absolute.’ Even a ‘significant interference’ with protected rights of political association’ may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.” (citations omitted)).
 61. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 366-67 (2010) (“Disclaimer and disclosure requirements may burden the ability to speak, but they ‘impose no ceiling on campaign-related activities,’ and ‘do not prevent anyone from speaking.’ The Court has subjected these requirements to ‘exacting scrutiny,’ which requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” (citations omitted)); see also *Buckley*, 424 U.S. at 64 (“We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny. We also have insisted that there be a ‘relevant correlation’ or ‘substantial relation’ between the governmental interest and the information required to be disclosed.” (citations omitted)).
 62. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000). I explore this instability at greater length in Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413 (2012).
 63. See *McCutcheon v. Fed. Election Comm’n*, 893 F. Supp. 2d 133, 137-38 (D.D.C. 2012), *prob. juris. noted*, 133 S. Ct. 1242 (2013) (“Although we acknowledge the constitutional line between political speech and political contributions grows increasingly difficult to discern, we decline Plaintiffs’ invitation to anticipate the Supreme Court’s agenda.”).

A. Contribution Limits

Contribution limits serve “to limit the actuality and appearance of corruption resulting from large individual financial contributions,” a governmental interest recognized in *Buckley v. Valeo* as a constitutionally sufficient justification.⁶⁴ The justification is subject to limitations based on the regulatory means and anti-corruption ends of a particular limit. In terms of the means, “contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.”⁶⁵ Relatedly, Justice Breyer has suggested that too low a contribution limit “significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from effective electoral challenge.”⁶⁶

In terms of anti-corruption ends, in some circumstances a limit might be “unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder, especially in campaigns for statewide or national office.”⁶⁷ Courts are deferential in their review of fit between the particular limit and the anti-corruption purpose, however, so “distinctions in degree become significant only when they can be said to amount to differences in kind.”⁶⁸

For example, Missouri’s contribution limits adopted in 1997 (and since repealed)⁶⁹ ranged from \$250 per election for state representative to \$1000 for statewide office and were adjusted for inflation. In considering their constitutionality, the Supreme Court accepted *Buckley*’s premise that “there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.”⁷⁰ In the absence of evidence that “the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless,” the Court did not find Missouri’s contribution limits to exceed “the outer limits of contribution regulation.”⁷¹

64. *Buckley*, 424 U.S. at 26.

65. *Id.* at 21.

66. *Nixon*, 528 U.S. at 404 (Breyer, J., concurring); cf. *Buckley*, 424 U.S. at 32 (finding in that case “no such evidence to support the claim that the contribution limitations in themselves discriminate against major-party challengers to incumbents”).

67. *Buckley*, 424 U.S. at 30.

68. *Id.*

69. See *Mo. Campaign-Contribution Limits Repealed*, FIRST AMENDMENT CTR. (July 20, 2008), <http://www.firstamendmentcenter.org/mo-campaign-contribution-limits-repealed>.

70. *Nixon*, 528 U.S. at 395.

71. *Id.* at 397.

On the other hand, Vermont's \$200 per election contribution limit for all offices was "substantially lower than both the limits the Court has previously upheld and comparable limits in other States," and therefore was not sufficiently tailored to the anti-corruption interest.⁷² Justice Breyer, writing for himself, Chief Justice Roberts, and Justice Alito, went on to ask if there existed any sufficient anti-corruption interest at such low contribution levels. "Indeed, other things being equal, one might reasonably believe that a contribution of, say, \$250 (or \$450) to a candidate's campaign was less likely to prove a corruptive force than the far larger contributions at issue in the other campaign finance cases we have considered."⁷³ Justice Thomas, in a concurrence joined by Justice Scalia, was less circumspect: "[I]t is almost impossible to imagine that any legislator would ever find his scruples overcome by a \$201 donation."⁷⁴ *Citizens United* reiterated that the only "corruptive force" sufficient to justify regulation of money in politics is quid pro quo corruption or its appearance. The Court clarified that "[i]ngratiation and access," obvious products of large campaign contributions, "are not corruption."⁷⁵

B. Disclosure Thresholds

In *Buckley*, the Supreme Court recognized that campaign finance disclosure serves three sufficiently important governmental interests: (1) providing the electorate with information, (2) deterring actual corruption and avoiding any appearance thereof, and (3) gathering the data necessary to enforce more substantive electioneering restrictions.⁷⁶ At the same time, the Court noted that the low disclosure thresholds at issue in *Buckley* "may well discourage participation by some citizens in the political process, a result that Congress hardly could have intended."⁷⁷ Noting that "there is little in the legislative history to indicate that Congress focused carefully on the appropriate level at which to require recording and disclosure," but instead that "it seems merely to have adopted the thresholds existing in similar disclosure laws since 1910," the Court faintly praised the levels as not being "wholly without rationality."⁷⁸

Elsewhere, the Court invalidated campaign disclosure "in the case of a handbill written by a private citizen who is not known to the recipient" when "the

72. *Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (plurality opinion).

73. *Id.* at 261.

74. *Id.* at 272 (Thomas, J., concurring). Later, writing for the Court in *Arizona Free Enterprise Club v. Bennett*, Chief Justice Roberts noted that Arizona's "ascetic contribution limits" were "austere" at \$840 per election cycle for statewide candidates and \$410 per election cycle for legislative candidates. 131 S. Ct. 2806, 2827 (2011).

75. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 360 (2010).

76. *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976).

77. *Id.* at 83.

78. *Id.*

name and address of the author add little, if anything, to the reader's ability to evaluate the document's message."⁷⁹ In another case, a plurality of the Court also suggested that campaign finance "regulations may create a disincentive for [advocacy] organizations to engage in political speech," including simple independent expenditure disclosure laws (which "impose administrative costs that many small entities may be unable to bear").⁸⁰ On the rare occasions lower courts have invalidated campaign finance disclosure laws, the cases typically have involved small organizations and small contributions to ballot issue committees that cannot pose the actual corruption threat posed by candidate contributions. For example, Colorado's law requiring campaign committees in ballot issue elections to register after accepting contributions or making expenditures exceeding \$200, and disclose contributors of \$20 or more, was invalidated as applied to opponents of a neighborhood annexation.⁸¹

Citizens United allowed for disclosure without apparent reservation. Finding "no constitutional impediment" to BCRA's electioneering disclosure and attribution requirements,⁸² the Supreme Court endorsed "transparency [that] enables the electorate to make informed decisions and give proper weight to different speakers and messages."⁸³ Effective disclosure serves an important interest in "provid[ing] shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."⁸⁴ However, the Court cited only the voter-information interest to support its conclusion, suggesting that anti-corruption and law-enforcement interests may not be sufficient to support disclosure.

III. RECALIBRATION

Given the constraints the Supreme Court has imposed on campaign finance law—and in view of the varied conceptions of anti-corruption and publicity interests across history and jurisdictions—some recalibration may be in order. The lines drawn in the post-Watergate era, many of which persist today at the federal

79. *McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334, 348-49 (1995).

80. *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 254 (1986). Justice O'Connor did not add her fifth vote to this part of the opinion, explaining that "the significant burden on [Massachusetts Citizens for Life] in this case comes not from the disclosure requirements that it must satisfy, but from the additional organizational [segregated fund] restraints imposed upon it by the Act." *Id.* at 266 (O'Connor, J., concurring).

81. See *Sampson v. Buescher*, 625 F.3d 1247, 1249 (10th Cir. 2010); see also *Canyon Ferry Baptist Church v. Unsworth*, 556 F.3d 1021, 1034 (9th Cir. 2009) (invalidating disclosure requirement as applied to a one-time de minimis expenditure in support of a ballot issue). The author served as counsel for the State of Montana in the case.

82. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010).

83. *Id.*

84. *Id.* at 370.

and state levels, do not fit current campaign practice any better than those drawn in the Progressive Era fit the post-Watergate years. In legal terms, the deference shown toward low contribution limits and disclosure thresholds in *Buckley* is unlikely to be shared by the increasingly skeptical current Court. In practical terms, the post-*Buckley* hybrid system of regulated contributions and unregulated expenditures, exacerbated by the post-BCRA weakening of political parties and the post-*Citizens United* bonanza of independent expenditures, may require second-best reforms. The regulatory goals of anti-corruption and publicity may be better served by redrawing lines.

A. *The Divergence Between Means and Ends*

Each era of campaign finance reform at the federal level, from the Corrupt Practices Act to FECA to BCRA, was driven by scandals surrounding contributions then valued at hundreds of thousands of dollars. From the corporate patrons in the early twentieth century to the covert supporters of the Committee to Reelect the President in the Watergate era to the donor denizens of the Lincoln Bedroom in the Clinton era, each anted up a six-figure sum. Yet the relative influence of such a large contribution has declined in value over the past century. A hundred thousand dollars at the time of the Publicity Act of 1910 would buy nearly half a million dollars' worth of "influence" in 1974 dollars, and more than \$2.3 million worth of alleged influence today. At the presidential level, campaign expenses nearly quintupled from 1908 to 1972, and quadrupled from 1972 to 2012.⁸⁵ In 1912, over 15 million votes were cast in the presidential election;⁸⁶ in 1972 nearly 78 million voters participated; and, in 2012, 130 million voters participated.⁸⁷ Yet, despite the vast increase in voters, there are barely any more federal and state elections and political offices now than there were a century ago.

Meanwhile, contribution limits have stayed level or moved slightly lower in real dollar terms. Although early federal campaign finance laws limited spending rather than contributions, a proposal contemporaneous with the 1925 Corrupt Practices Act would have set a \$500 limit equivalent to \$6,600 in 2012 dollars for presidential campaign contributions.⁸⁸ The two state contribution limits of the

85. See Dave Gilson, *The Crazy Cost of Becoming President*, MOTHER JONES, Feb. 20, 2012, <http://www.motherjones.com/mojo/2012/02/historic-price-cost-presidential-elections>; Seth Masket, *The Cost of a Presidential Campaign*, PAC. STANDARD, July 2, 2013, <http://www.psmag.com/politics/the-cost-of-a-presidential-campaign-61649>.

86. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 373 tbl. 509 (1965).

87. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 244 tbl. 397 (2012), <http://www.census.gov/compendia/statab/2012/tables/12s0397.pdf>; Michael McDonald, *2012 General Election Turnout Rates*, U.S. ELECTION PROJECT (July 22, 2013), http://elections.gmu.edu/Turnout_2012G.html.

88. S. 3114, 68th Cong., 65 CONG. REC. 6515 (1924).

era were \$1,000, or about \$17,000 in 2012 dollars, even though each state had only a fraction of the voters and campaign costs of the presidential election. The 1974 FECA contribution limit of \$1,000 per election would have been worth \$4,660 in 2012 dollars, nearly twice as much as the \$2,500 inflation-adjusted limit applicable in 2012. In 1975, the small state of Montana set a \$1,500 gubernatorial contribution limit, an amount worth about \$6,400 in 2012 dollars⁸⁹—more than ten times the inflation-adjusted \$630 limit set by the state for 2012.⁹⁰

Moreover, disclosure thresholds have tightened by an order of magnitude over the past century. The original federal Publicity Act threshold of \$100, and similar state disclosure thresholds, would amount to about \$2,300 in 2012. The same \$100 set by FECA in 1974 would still equal more than \$500 in 2012. Yet the federal disclosure threshold has stayed stuck at \$200 since 1979, and many states require disclosure of contributions at a threshold of no more than \$100.

Consider again the hundred-thousand dollar contributor to a presidential campaign. In a multi-million dollar campaign of the 1910s or 1920s, the contributor's funding of more than one percent of the candidate's campaign may earn him a spot as one of a handful of trusted outside advisors. In a hundred-million dollar campaign of the 1970s, the contributor's funding of one-thousandth of the candidate's campaign may earn him an annual sit-down meeting with the candidate or top-level staff, and perhaps special consideration in a valuable policy discussion. In today's billion-dollar campaign, even the hundred-thousand dollar contributor is funding just one-hundredth of one percent of the campaign. The trusted advisor of a century ago becomes today's recipient of a handshake and photo opportunity.

B. Reasons to Recalibrate

Current law therefore reflects a different magnitude of concern than whatever anti-corruption and publicity meant to the original campaign finance reformers of the early twentieth century. Contribution limits and disclosure thresholds have failed to keep pace with the growth in the size of the electorate and the cost of campaigning. As a result, the lines drawn by campaign finance laws have stayed level or decreased by an order of magnitude. Such a broad divergence over time between means and ends—the law and its effects—may suggest to skeptics of regulation, and even to pragmatists balancing regulation's costs and benefits, possible “danger signs” that such lines “are not closely drawn.”⁹¹ However, even

89. 1975 Mont. Laws 1265, 1265-66.

90. MONT. CODE ANN. § 13-37-216; see Mont. Comm'r of Political Practices, *Political Campaign Contribution Limits Summary*, MONTANA.GOV (Oct. 2011), <http://politicalpractices.mt.gov/content/5campaignfinance/ContributionLimitSummaryfor2012ElectionCycle>.

91. *Randall v. Sorrell*, 548 U.S. 230, 249-53 (2006) (plurality opinion) (citing as “danger signs” relatively low limits, the devaluation of those limits by inflation, and the ratio of those limits to population and campaign costs).

champions of campaign finance regulation should reconsider their commitment to the lines drawn now. Interests in anti-corruption, publicity, competitiveness, minimizing fundraising time, and perhaps political equality might be better served by recalibrating campaign finance law to allow larger contributions and less disclosure.

The anti-corruption interest, even broadly conceived as undue influence or merely “ingratiation and access,”⁹² does not necessarily require that contribution limits be drawn as low as possible. It is the relative size of the contribution, not the absolute size of the contribution, that poses the primary corruption risk. In a billion-dollar presidential campaign, even a \$100,000 contribution might only get the contributor into an arena with thousands of other major contributors. In a \$10,000 state legislative campaign, on the other hand, even a \$200 contribution could put the contributor in a conference room with fewer than 50 other major contributors. Although a President might control a large enough agenda and staff to allow undue influence by some of those ten thousand six-figure contributors, it is more likely that the state legislator’s three-figure contributors will make it onto his relatively smaller agenda. The logic of the anti-corruption interest and its variants is that a candidate’s agenda and time are limited, so the corruption risk arises from a contributor’s rank relative to others. There are only so many seats at the candidate’s table for contributions of any size. Like the candidate, recalibration takes account of the scale of the contribution relative to the scale of the office and its agenda.

At any scale, it may be preferable to allow hundreds or thousands of relatively large contributions rather than to have relatively low contribution limits that divert funds to independent expenditures. The fact that the influence of contributions depends on relative rather than absolute size reduces the corruption concerns arising from large number contributions. When there are more contributors making large but limited contributions than can plausibly influence a candidate, he may have more freedom to control his own campaign agenda. Unlimited independent expenditures by organizations, on the other hand, may vastly exceed the value and influence of even large limited individual contributions. Unlimited independent expenditures therefore leave a candidate more vulnerable to outside groups’ opposition or reliant upon their support. Moreover, relative to individual contributions, independent expenditures come from fewer concentrated interest groups. Even if low contribution limits might achieve anti-corruption ends standing alone, in a system with unlimited independent expenditures, they may be less effective than higher contribution limits.

Similarly, the publicity interest might be optimized at higher disclosure thresholds than are drawn by current state and federal laws. To the extent publicity serves anti-corruption ends, the reasoning above also would argue for proportionately higher disclosure thresholds. Less disclosure of smaller contributions might make potential contributors on the margin more willing to invest in politics quietly, without sharing their ideological commitments with their

92. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 350 (2010).

friends, neighbors, and employers on the Internet.⁹³ The more a candidate can rely on small contributions, the less a candidate must depend upon large contributors, or fear large independent expenditures. Among contributors of small amounts, less disclosure also may increase participation by political moderates relative to strong ideologues.⁹⁴ Beyond this, disclosure thresholds are only part of a larger system of campaign finance disclosure.⁹⁵ The system might achieve more transparency, and more accountability, under laws in which small contributions are less costly in disclosure terms. Again, a candidate who can rely on many direct contributions, including many small and undisclosed contributions, will be more able to engage in accountable campaign speech attributed to the candidate himself, and less dependent on undisclosed interests funding independent expenditures.

This discussion suggests how recalibration also might satisfy other interests. In the absence of spending limits, and the presence of unlimited independent expenditures, competitive races require candidates to raise sufficient money to run their campaigns and respond to opposition. This is the logic of the entrenchment concern expressed by Justice Breyer—that a low contribution limit “significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from effective electoral challenge.”⁹⁶ Easier availability of small contributions resulting from higher disclosure thresholds, and larger contributions available under higher limits, may address this entrenchment concern by making more funds available to challengers. Upwards recalibration also mitigates the concern about the excessive time officeholders spend fundraising, particularly in a system that now includes unlimited independent expenditures.

The strongest argument against recalibrating campaign finance toward higher contribution limits and disclosure thresholds is based on political equality. Higher contribution limits will further concentrate campaign finance in the hands of wealthy elites, according to the argument, and high disclosure thresholds will make it harder for ordinary citizens to know which elites have funded which candidates. A quick answer to this argument is that equality is not a constitutionally cognizable interest that campaign finance laws may serve. Yet that does not preclude lawmakers from pursuing political-equality ends through means that otherwise do not burden the recognized right to spend and contribute money in political campaigns. Indeed, the most that can be said for the Supreme Court’s unusual deference toward contribution limits under “exacting” scrutiny is that it has left room for campaign finance laws to pursue the unrecognized

93. See Raymond J. La Raja, *Political Participation and Civic Courage: The Negative Effect of Transparency on Making Small Campaign Contributions*, POL. BEHAVIOR (Oct. 2013), <http://link.springer.com/article/10.1007%2Fs11109-013-9259-8>.

94. See *id.*

95. See Johnstone, *supra* note 8.

96. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 404 (2000).

equality-of-speech interest at little expense to the recognized liberty-of-speech interest.

A more persuasive answer to the political equality argument is practical rather than doctrinal. Given a system in which moneyed interests increasingly dominate campaign finance through constitutionally protected independent expenditures, allowing larger and more undisclosed contributions might actually advance political equality. In the status quo, million-dollar contributions fund independent expenditures and thousand-dollar and hundred-dollar contributions fund candidates. Absent public funding, the only new sources of money available to a candidate are the hundred-dollar contributors who want to contribute a thousand dollars in a state campaign, or the thousand-dollar contributors who want to contribute ten thousand dollars in a federal campaign, and the non-contributors who might contribute a hundred dollars if they could do so anonymously. A system that encouraged these relatively larger contributions would be more dependent on those moderately wealthy contributors, but also may be less dependent on the extremely wealthy contributors funding independent expenditures.

This is a second-best solution that does relatively little to encourage participation among average citizens, most of whom do not contribute to campaigns at any level. However, encouraging somewhat larger contributions may improve the representation of average citizens in the donor class. In socioeconomic and demographic terms, donors contributing small amounts are most representative of the average citizen, but donors contributing medium amounts still are more representative of the average citizen than those making the largest contributions.⁹⁷ Higher contributions limits and disclosure thresholds increase the share of campaign funding from medium and small donors, which may more closely align the donor class with the electorate. The additional money from these donors also may reduce the relative share of campaign spending—and potential influence—from independent expenditures that represent the extremely wealthy.⁹⁸ Meanwhile, the status quo also does relatively little to encourage participation among ordinary citizens, yet is more dominated by independent expenditures from the extremely wealthy.

97. See Wesley Y. Joe et al., *Do Small Donors Improve Representation? Some Answers from Recent Gubernatorial and State Legislative Elections*, CAMPAIGN FIN. INST. 7-16 (2008), http://www.cfinst.org/pdf/books-reports/APSA_2008_SmallDonors.pdf (finding in a survey study of state elections that, although small donors contributing \$100 or less in an election year are most representative of the socioeconomic and demographic characteristics of non-donors, medium donors contributing between \$100 and \$500 are more representative of non-donors than large donors contributing \$500 or more).

98. See Michael Beckel, *Adelson Gave \$40 Million to Super PACs in Final Weeks of Election*, CENTER FOR PUB. INTEGRITY (Dec. 21, 2012), <http://www.publicintegrity.org/2012/12/21/11950/adelson-gave-40-million-super-pacs-final-weeks-election> (reporting that donors giving at least \$4.1 million accounted for more than one-third of all federal super PAC receipts).

C. What Recalibration May Look Like

The divergence between the general ends of anti-corruption and publicity and the particular means of specific contribution limits and disclosure thresholds varies across political campaigns. Current presidential campaign contribution limits are hard to justify on anti-corruption grounds given the scale of today's campaigns. Perhaps a ten-figure campaign justifies a five-figure contribution limit. At the congressional level, Senate campaign-contribution limits might double to reflect the increased scale of those races, and House campaign-contribution limits might hold at current (inflation adjusted) levels. In any event, the obsolete Progressive Era nominal disclosure threshold might be adjusted to \$1,000, or more in a presidential campaign, without sacrificing the publicity interest in large contributions.

Recalibration should not go only in one direction, however. At the state level, certain limits and thresholds might be lowered for minor state and local campaigns, as long as the administrative burden is not undue. Yet it is difficult to justify many of the tightest contribution limits as major state campaigns draw more out-of-state independent expenditures.⁹⁹ A candidate in a small state subject to low contribution limits may only be able to respond to outside influence by seeking out-of-state contributions. Better, perhaps, that state and local candidates rely more heavily on fewer but larger home-grown contributions than chasing out-of-state contributions just to keep up with out-of-state independent expenditures.

In the end, however, the point of recalibration is not to answer these questions, but to pose them. Campaign finance regulators at the federal and state levels should recognize the contingency of campaign finance rules. Legal means that once served anti-corruption or publicity ends at one place or time may not serve those same ends as effectively here and now. Experience over time and in the states shows it is possible to address anti-corruption and publicity concerns by drawing lines both high and low depending on the circumstances. The *Citizens United* regime is not going anywhere in the short term. Under the regime we have, do contribution limits and disclosure thresholds serve their purposes at their current levels? Or might they better serve those purposes, including political equality and other purposes that are antithetical to the *Citizens United* regime, at significantly higher (or lower) levels depending on their context? There is unlikely to be just one answer to these questions. Yet one answer is precisely what outdated contribution limits or one-size-fits-all disclosure thresholds provide.

99. See Anthony Johnstone, *Outside Influence* (Dec. 11, 2013) (unpublished manuscript) (on file with author).

CONCLUSION

The recalibration project is radically moderate. It asks opponents of regulation to consider whether their objection to the current campaign finance regime goes to whether to draw lines or, instead, where to draw lines. In doctrinal terms, it seeks a concession that anti-corruption and publicity interests remain sufficiently important ends to justify some form of line-drawing, but concedes that some of the lines now drawn are not substantially related to those ends. It asks proponents of regulation to consider the possibility that a second-best reform that loosens contribution limits and disclosure thresholds might accomplish their goals better than regulating wherever possible as strictly as possible. It might lead to a return to decentralized federal campaign finance rules, diversification of the current one-size-fits-all regime, and recalibration of contribution limits and disclosure thresholds to the circumstances of each state. A liberalizing recalibration of campaign finance regulation even could avoid successful constitutional challenges before a skeptical Supreme Court in the short term, leaving major battles to be fought another day on potentially more favorable ground. Above all, the recalibration project asks whether our campaign finance laws truly still serve the purposes we once thought they served.

